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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 29

CARL A. HANSBERRY, NANNIE L. HANSBERRY, *et al.*,

Petitioners,

vs.

ANNA M. LEE, EDWARD L. GOVANUS, ESTHER GOVANUS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF PETITIONERS.

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PETITION FOR CERTIORARI FILED MARCH 11, 1940.
CERTIORARI GRANTED APRIL 22, 1940.

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SUBJECT INDEX.

BRIEF OF PETITIONERS — PAGE

Opinions of Court Below 1
Jurisdictional Statement 2-6
Statement of the Case 7-19
Specifications of Errors 19-20
Summary of the Argument 21-25

Argument 26-59

I. The affirmance by the State Supreme Court of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners the benefit of notice in the instant suit and a real opportunity to appear, to be heard, and to defend, and so deprived each of the petitioners of his property without due process of law and denied to each of them the equal protection of the laws 26-27

A. The case of *Burke* v. *Kleiman,* held by the State Supreme Court to be a class or representative suit and *res judicata* against all the petitioners as to execution, acknowledgment and compliance with the conditions precedent to the restrictive agreement coming into effect, was not a class or representative suit. The case was one in which one property owner was suing another property owner to enforce the agreement to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement 27-33

PAGE

A property owners' restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, there being no common subject matter and no identity of interest among them 33-34

The issue as to whether a property owner is bound is as to each inherently personal in respect to individual execution and acknowledgment, and in respect to which no property owner can be represented 34-35

In particular, among the personal defenses available to each owner in respect to the instant restrictive agreement was the defense that the undertaking of the owner was that he should not be bound unless the owners of 95 per cent of the frontage joined in the agreement. This personal defense is foreclosed by the use of the representative suit device.....34-35

A representative or class suit, if permitted and sustained in such a case, would destroy essentially these personal defenses, namely, forgery of signatures, fraud and trickery in obtaining signatures, alteration of the instrument, laches, waiver, abandonment, estoppel, and change in the character of the neighborhood in respect to each individual property owner which would render inequitable the enforcement of the purported agreement..35-39

PAGE

B. The purported agreement involved in *Burke* v. *Kleiman* and in the instant suit provided that it was to be null and void and of no force and effect unless signed, sealed and acknowledged by the owners of 95 per cent of the frontage. The proof in the instant case, as found by the trial chancellor, showed that this condition precedent to validity was not complied with; consequently, no agreement ever came into force or effect and there was no class to be represented by anyone. The court had no jurisdiction to bind the petitioners and their privies who were not parties and not served with summons or process in said cause. The decree of *Burke* v. *Kleiman* was therefore void and could not be pleaded as *res judicata* against these petitioners.....40-45

II. The petitioners were deprived of their rights and property without due process of law by the judgment of the Supreme Court of the State of Illinois, in sustaining the decree of the lower court which applied against the petitioners as *res judicata* the case of *Burke* v. *Kleiman,* the proceedings and decree in which were fraudulently and collusively brought and maintained as found by the trial chancellor 45-49

There was fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that had actually been signed by the necessary owners of 95 per cent of the frontage, and fraud in the jurisdictional allegation that

PAGE

there was a class to be represented when in fact, no such class ever existed. Moreover, the said proceedings were fraudulently maintained by means of a false stipulation of facts that the required frontage consent had been obtained 45-49

The false stipulation of facts was preceded by stipulation of counsel in said cause that a stipulation of fact would be entered into in lieu of evidence and the case tried upon the pleadings without the necessity of any proof of any sort 45-49

Such a fraudulent proceeding and decree cannot be *res judicata* against anyone.....45-49

III. The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary and contrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution 50-51

A. The effect of the decree was to take property away from the petitioners, Hansberrys, and give it to Crook, their predecessor in title and an alleged co-conspirator with them, without compensation 50-51

(1) Due process under the Fourteenth Amendment includes the proposition that property shall not be taken from one person by State action, whether legislative, judicial or executive, and given to another, without compensation 50-51

PAGE

IV. The decree of the State courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution 52-54

V. The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee, and Harry H. Pace, sued as its president, was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.....54-55

VI. The enforcement by the courts below of a restrictive agreement which prohibits Negroes from owning property on account of race or color, is State action within the meaning of the Fourteenth Amendment and therefore is in violation of said Amendment, in that it is a deprivation of rights and property without due process of law and constitutes a denial of equal protection of the laws 55-59

A. If the legislative branch as an arm of the State cannot separate persons in neighborhoods on the basis of color or race, as was held in the case of *Buchanan* v. *Warley*, 245 U. S. 60, it follows that the judicial branch as an arm of the State cannot do so 55-59

PAGE

B. The enforcement of the restrictive agreement by the courts below abridges the rights, privileges and immunities of petitioners as citizens of the United States in violation and the Fourteenth Amendment 55-59

Conclusion 59

TABLE OF CASES CITED.

Beck v. Lash, 303 Ill. 549..... 4

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673.....2, 26, 27, 36, 56

Buchanan v. Warley, 245 U. S. 60.....25, 57

Burke v. Kleiman, 277 Ill. App. 519, 189 N. E. 372..14, 15

Carter v. Texas, 177 U. S. 422.....4, 56

Caswell v. Caswell, 120 Ill. 377..... 4

Chase National Bank v. Norwalk, 291 U. S. 431...3, 26, 27

Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U. S. 228.....3, 4, 50, 51, 55

Christopher v. Brusselback, 302 U. S. 500.....5, 32, 38

Colgate v. Harper, 296 U. S. 404.....4, 57

Creswill v. Knight of Pythias, 225 U. S. 246.....4, 53

Cutting v. Gilbert, 5 Blatchford, 259, 261..... 33

Davidson v. New Orleans, 96 U. S. 97, 102..... 3

Delmar Jockey Club v. Missouri, 210 U. S. 324..... 3, 4

Earle v. McVeigh, 91 U. S. 503.....3, 36

Ex parte Virginia, 100 U. S. 339.....4, 56

Fayerweather v. Ritch, 195 U. S. 276..... 29

Galpin v. Page, 18 Wall. 350 at 365.....41, 43

Geter v. Hewitt, 22 Howard 364..... 48

Hague v. C. I. O., 307 U. S. 496..... 58

Hale v. Allison, 188 U. S. 56 at 77 *et seq*..... 39

Hale v. Hale, 146 Ill. 227, 258.....3, 32

Hamer v. New York Railways Co., 244 U. S. 266....2, 34

PAGE

Hartford Life Ins. Co. v. Ibs, 237 U. S. 662..... 2
Hatfield v. King, 184 U. S. 163..... 48
Home Telegraph Co., etc. v. Los Angeles, 227 U. S. 278 4
Kelley v. Gill, 254 U. S. 116 at 120..... 39
Lee v. Hansberry, 372 Ill. 369, 24 N. E. (2d) 37..... 1
Lord v. Veazie, 8 Howard 251.....4, 48
Matthews v. Rodgers, 284 U. S. 521..... 39
Michaels v. Post, 21 Wall. 298..... 4
Missouri Pacific Ry. v. Nebraska, 164 U. S. 403..... 50
Norris v. Alabama, 294 U. S. 578.....4, 53
Old Wayne Life Ins. Co. v. McDonough, 204 U. S. 8 .....5, 41, 44
Pennoyer v. Neff, 95 U. S. 714..... 3
People v. Sterling, 357 Ill. 354..... 4
Postal Cable Tel. Co. v. Newport, 247 U. S. 464...2, 26, 36
St. Louis, Iron Mountain & Southern Ry. Co. v. McKnight, 244 U. S. 368 at 375..... 39
Saunders v. Poland Park Co., 198 Atl. 269 (Md. Ct. of Appeals) 32
Scott v. Donald, 165 U. S. 107..... 2
Scott v. McNeal, 154 U. S. 34.....3, 5, 33, 41, 56
Simons v. Craft, 182 U. S. 437..... 3
Smith v. Swormstedt, 76 Howard 288.....2, 32
Strauder v. West Virginia, 100 U. S. 303.....4, 55
Thompson v. Whitman, 18 Wall. 457, at 468-470..... 44
Truax v. Corrigan, 257 U. S. 321.....4, 53
Wabash Railway Co. v. Adelbert College, 208 U. S. 38 .....2, 30, 32, 34, 36
Ward v. Board of County Comm'rs, 253 U. S. 17.... 3
Weberpals v. Jenny, 300 Ill. 156.....3, 32
Whitney v. Mayo, 15 Ill. 251..... 39
Williams v. Gibbes, 17 Howard 239..... 3
Windsor v. McVeigh, 93 U. S. 274.....2, 26, 27, 31, 36

TEXT BOOKS CITED.

Pomeroy, Equity Jurisprudence, 4th Ed. (1918), Vol. I, Sec. 268, pages 498-9 .....

STATUTES CITED.

Statute of 13 Edward I.c.l. De Donis (Mortmain Acts)

LAW REVIEW ARTICLES.

34 Harvard Law Review 639 at 651-3.. .....

Illinois Law Review, Vol. 25 (June, 1940), No. 2, pages 213-18 .....

University of Chicago Law Review, Vol. 7, No. 3 (April, 1940) .....

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OPINION OF THE COURT BELOW.

(Majority and Dissenting Opinion.)

The opinion of the Supreme Court of Illinois is reported in 372 Ill., page 369, of the Illinois Reports, and also in 24 N. E. 2nd, page 37, as well as in the record filed in this cause (R. 327-336).

JURISDICTIONAL STATEMENT.

1. The jurisdiction of this Court is based upon Section 237b of the Judicial Code as amended by the Act of February .13, 1925; Volume 8, Fed. Code Annotated (FCA), Title 28. Judicial Code, Section 344(b).

The Supreme Court of Illinois, on October 10, 1939, by *a divided court,* affirmed the judgment or decree of the Circuit Court of Cook County, Illinois, in favor of the respondents herein and against the petitioners. (Volume 372 Ill., page 369, 24 N. E. (2d) 37.) Petition for rehearing was later filed by petitioners within the time allowed by the rules of the Supreme Court of Illinois on the 4th day of November, 1939 (R. 337), and afterwards was denied on December 13, 1939, and the petition for certiorari was filed in this court within three months after the denial of the petition for rehearing in the Supreme Court of Illinois.

The affirmance of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners notice and a real opportunity to appear, to be heard, and to defend, and violated the petitioners' rights to due process of law under the 14th Amendment to the Federal Constitution under which Amendment the petitioners specially set up and claimed certain rights, titles, privileges and immunities. See *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464 at 476; 38 S. Ct. 566, 62 L. Ed. 1215; *Wabash Railway Co.* v. *Adelbert College,* 208 U. S. 38 at 57-58 and 59, 28 S. Ct. 182, 52 L. Ed. 379; *Hartford Life Ins. Co.* v. *Ibs,* 237 U. S. 662 at 671; *Smith* v. *Swormstedt,* 16 Howard 288 at 303; *Hamer* v. *New York Railways Co.,* 244 U. S. 266 at 273; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 682; *Scott* v. *Donald,* 165 U. S. 107 at

115 to 117; *Pennoyer* v. *Neff*, 95 U. S. 714 at 733; *Scott* v. *McNeal*, 154 U. S. 34 at 45 and 46; *Williams* v. *Gibbes*, 17 Howard 239 at 254, 257; *Simon* v. *Craft*, 182 U. S. 437; *Ward* v. *Board of County Commissioners*, 253 U. S. 17 at 22; *Chase National Bank* v. *Norwalk*, 291 U. S. 431 at 438; *Windsor* v. *McVeigh*, 93 U. S. 274 at 277; *Earle* v. *McVeigh*, 91 U. S. 503; *Hale* v. *Hale*, 146 Ill. 227, 258; *Weberpals* v. *Jenny*, 300 Ill. 156.

The affirmance of the decree of the trial court necessarily deprived the Hansberrys of their rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution because no compensation was provided for them in or by said decree thereby amounting to a spoliation and said Hansberrys specially set up and claimed rights, privileges, titles and immunities as citizens of the United States of America under Section One of the 14th Amendment to the Federal Constitution which was thereby drawn in question; and moreover the said Hansberrys, petitioners, were denied due process of law and the equal protection of the laws, and their rights, privileges, and immunities as citizens of the United States were abridged. See Delmar Jockey Club in Missouri, 210 U. S. 324 at 335. *Chicago Burlington and Quincy R. R. Co.* v. *Chicago*, 166 U. S. 226; *Davidson* v. *New Orleans*, 96 U. S. 97, 102.

The petitioners set up and claimed specially under the 14th Amendment to the Federal Constitution certain rights, titles, privileges and immunities which they asserted were denied and abridged by the enforcement, by the state's judicial officers and courts, of a harsh, oppressive and discriminatory property owner's covenant, and the 14th Amendment to the Federal Constitution was thereby necessarily drawn in question by the decree and judgment of the Illinois Supreme Court in sustaining

the lower court's decree. *See Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 at 233-35; *Home Telegraph, etc.* v. *Los Angeles,* 227 U. S. 278; *Ex parte Virginia,* 100 U. S. 339; *Strauder* v. *West Virginia,* 100 U. S. 303; *Carter* v. *Texas,* 177 U. S. 442; *Colgate* v. *Harvey,* 296 U. S. 404 at 430-433.

The petitioners' rights to due process of law were denied and abridged by the affirmance of the decree of the trial court which reluctantly held that *Burke* v. *Kleiman,* though a fraudulent and collusive suit, was *res judicata* and therefore binding upon the petitioners in the instant case. See *Lord* v. *Veazie,* 8 Howard 251 at 255; *Michaels* v. *Post,* 21 Wall. 298; *Caswell* v. *Caswell,* 120 Ill. 377; *Beck* v. *Lash,* 303 Ill. 549; *People* v. *Sterling,* 357 Ill. 354.

The rights of the petitioner Katz to due process of law were denied and abridged in that the decree enjoined said Katz without any evidence whatsoever in support of said injunction so that said decree amounted to an arbitrary and capricious judicial seizure of Katz' property. See *Chicago Burlington and Quincy R. R. Co.* v. *Chicago,* 166 U. S. 226 at 233-235; *Delmar Jockey Club* v. *Missouri,* 210 U. S. 324 at 335; *Norris* v. *Alabama,* 294 U. S. 578 at 590; *Creswill* v. *Knights of Pythias,* 225 U. S. 246 at 261; *Truax* v. *Corrigan,* 257 U. S. 312 at 324-5.

The petitioners' rights to due process of law were denied and abridged in that the decree of *Burke* v. *Kleiman,* a void judgment or decree, was pleaded and sustained as *res judicata* against them. The decree in the instant case found that *Burke* v. *Kleiman* was a class suit and therefore binding upon the petitioners herein, although no class in fact ever existed, as shown by the finding of the trial chancellor both in his oral opinion (R. 192-193) and decree that the agreement sought to be specifically

enforced was executed by 54 per cent of the frontage instead of 95 per cent, as required by its own terms. (R. 78.) The court in *Burke* v. *Kleiman* lacked jurisdiction of the parties and the subject matter because the agreement sought to be enforced had never become operative by its own terms. See *Christopher* v. *Brusselback,* 302 U. S. 500; *Old Wayne Life Ass'n. of Ind.* v. *McDonough,* 204 U. S. 8 at 15-17, 23; *Scott* v. *McNeal,* 154 U. S. 34 at 45, 46.

The petitioners raised the Federal questions sought to be reviewed by filing their several and respective motions to strike and dismiss the respondents' suit, in which they contended that the enforcement of the restrictive agreement violated the 14th Amendment and Sections 1977 and 1978 of the Revised Statutes and was contrary to the aims, purposes and objects as expressed in the Federal Constitution (R. 15-19). The trial court overruled the petitioners' several and respective motions to strike and dismiss (R. 20).

The petitioners then filed their several and respective answers setting up the same Federal questions (R. 23-33, 36-41, 56-71). The petitioners likewise filed their several and respective motions to dissolve (R. 34-35), again asserting the Federal questions sought to be reviewed here. To the defendants' plea of *res judicata* raised in their reply, the defendants filed their several and respective rejoinders to said reply, denying that they had been estopped upon the basis of said decree of *Burke* v. *Kleiman,* and further asserted that the sustaining of a plea of *res judicata* and any estoppel against them would deny them of due process of law and the equal protection of the laws in violation of the 14th Amendment (R. 51, 53, 65-71, 71-72).

The trial chancellor in his decree (R. 72-88), sustained

the plea of *res judicata* in the reply and sustained the objections to the defendants' answers in which they had asserted the Federal Constitutional questions above set up (R. 82, 86).

Upon the trial of the cause the defendants objected to the introduction of Plaintiffs' Exhibit No. 5 (R. 142-145, 315-319) (which was the alleged restrictive agreement), on the Federal grounds above asserted. The trial court overruled said objections and allowed the introduction of the said restrictive agreement in evidence against the petitioners (R. 145). The trial court in its decree found that the enforcement of the restrictive agreement did not violate any article of the Constitution of the United States and is not unconstitutional; that it was not against public welfare; that it did not deprive the petitioners of any of their equal or civil rights nor did it deprive the petitioners or Negroes as a class, of due process of law under the Federal Constitution; and then proceeded to sustain the plea of *res judicata* as well as the objections of the plaintiffs to the answers of the petitioners (R. 86).

The petitioners again raised the above mentioned Federal Constitutional questions in their appeal to the Supreme Court of Illinois, and as provided in the rules of the Supreme Court of Illinois, assigned these errors in a portion of their brief entitled "Errors relied upon for reversal." The petition for rehearing in the Supreme Court of Illinois, raised the same Federal Constitutional question.

The affirmance by the Supreme Court of Illinois, of the decree of the trial chancellor who had ruled adversely on the Federal Constitutional questions raised by the petitioners, necessarily involved substantial Federal questions, the disposition of which were necessary to a determination of the case.

STATEMENT OF THE CASE.

Thes respondents,, Anna M. Lee, Edward L. Govanus, Esther Govanus, Louise G. Anderson, Lyman M. Anderson and Kathryn Luttrell (plaintiffs below), brought an action in the Circuit Court of Cook County, Illinois for the purpose of enforcing a certain "restrictive agreement" (R. 2-6) purporting to involve 500 or more parcels of real estate owned by 500 or more owners of a certain section in the City of Chicago. The area covered by the "restrictive agreement" consists of approximately twenty-seven blocks and parts of blocks between Sixtieth and Sixty-third Streets and between Cottage Grove and South Park Avenues in the City of Chicago, which said area is bounded on the south by approximately 12,000 colored people (R. 181), on the north and west by approximately 50,000 colored people (R. 176, 181-182), on the north by Washington Park, used predominantly by colored people (R. 182). More than 125 colored families have lived within said area for periods ranging from three to five years prior to the commencement of this action (R. 58). *The area "constitutes a white pocket within a colored area"* (R. 119) *and is entirely surrounded by colored people; it includes South Park Avenue which runs through and is adjacent to the heart of* the South Side district in Chicago occupied by at least 150,000 colored people. The area in question is not separated from the territory generally occupied by colored people in Chicago, but is contiguous to the so-called colored district that has steadily, since 1914, developed southward from Twenty-second Street. As the colored population increased, the area continued to expand southward to Sixtieth Street where the "restricted" area begins and then, as housing facilities became more scarce,

the population penetrated further south and east of the said restricted area beyond Sixty-third Street—the end of the said "restricted" area—*leaving said area practically encircled by colored people.*

Prior to the year 1914 the community occupied primarily by Negroes did not extend beyond Twenty-second Street south of the Chicago Loop district (R. 180-183). Beginning in 1914 Negro industrial workers came north in large numbers and to the City of Chicago because of the cutting off of European immigration and the excessive demands for workers growing out of the World War. This South Side community gradually extended until the year 1928 when it had reached Sixty-seventh Street on the south, Cottage Grove Avenue on the east and Wentworth Avenue on the west (R. 180-183). The substance of this agreement in controversy was that no part of the property purported to be restricted should be sold, leased to, or permitted to be occupied by any person of the colored race prior to January 11, 1948, or thereafter, unless said "restrictive agreement" should be abrogated by the owners of 75 per cent of the frontage. The agreement, among other things, contained the following provisions:

> "This agreement and the restrictions therein contained, shall be of no force or effect unless this agreement or a substantially similar agreement shall be signed by the owners above enumerated of 95 percentum of the frontage above described or their heirs and assigns, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, on or before December 31, 1928." (R. 3.)

The complaint, as amended, alleged that the owners of 95 per cent of the frontage signed the restrictive agreement, and that it was recorded February 1, 1928. It further alleged a conspiracy on the part of the petitioners

to destroy the agreement by selling or leasing property in the restricted area to Negroes. It charged particularly that there had been a conspiracy between the petitioners, James J. Burke, Jay B. Crook, Harry H. Pace, The Supreme Liberty Life Insurance Company, a corporation, and the Hansberrys, to violate said restrictive agreement by the acquisition and purchase of the premises at 6140 Rhodes Avenue by the said Hansberrys through the means of Jay B. Crook (R. 7-12). The complaint further charges that the petitioner, Israel Katz, a white man, had listed for sale his property at 6018 Vernon Avenue, with James J. Burke, a white real estate broker, and had made threats to sell his property to Negroes (R. 12-13).

The complaint further alleged that the several respondents were parties to and signers of the alleged restrictive agreement; that they were the several owners of certain properties in said area and, further, that their real estate would be irreparably damaged by reason of the violation of the agreement (R. 12).

The respondents sought a temporary injunction which petitioners resisted by motions to strike the complaint and dismiss the suit and by oral argument in support thereof (R. 15-19).

On July 8, 1937, Judge Michael Feinberg, the trial chancellor ,entered, over the objections of petitioners, a temporary mandatory injunction, requiring the Hansberrys to move from the premises at 6140 Rhodes Avenue, and ordering a writ of assistance to issue upon failure of said Hansberrys to move from said premises (R. 20-21). Said order of injunction likewise found that the Hansberrys were unlawfully in title to the aforesaid premises at 6140 Rhodes Avenue (R. 22), although said cause had not been heard upon the merits, and although said case was not at issue on the pleadings. The peti-

tioner, Katz, was likewise enjoined from selling or leasing his property to colored people (R. 21).

The respondents filed their several and respective sworn and verified answers (R. 23-33, 36-41, 56-64) categorically and specifically denying the allegations of the complaint as to the charges of conspiracy, and denying that the owners of 95 per cent of the frontage described in the restrictive agreement had signed the agreement and asserting that the agreement never went into force or effect. The petitioners in their answers (R. 23-33, 36-41, 56-69) likewise set up several affirmative defenses contending that the alleged restrictive agreement was invalid and void, was an unlawful restraint on alienation, was also against the public policy of the State of Illinois and the United States of America, and that the enforcement of the restrictive agreement by the courts of the State of Illinois, would deprive the defendants of their liberty, their freedom of contract, their rights and their property without due process of law, and would likewise deprive the petitioners of the equal protection of the law, and would abridge the privileges and immunities of the petitioners as citizens of the United States of America, in violation of the 14th Amendment to the United States Constitution (R. 23, 28, 29, 33, 62).

The petitioners in their several and respective answers likewise denied that the alleged restrictive agreement was a covenant running with the land, but asserted that it was merely a personal covenant against persons on account of their race and color. Petitioners further denied that respondents were bringing a representative suit, and stated that there had been such a change in the character of the neighborhood that it would be inequitable to enforce any such alleged agreement (R. 23-33, 36-41, 56-64). The petitioner, Katz, denied the execution and ac-

knowledgment of the agreement and stated under oath that his signature to said alleged agreement had been obtained by fraud and trickery (R. 60-61, 172).

After the filing by the petitioners of their several answers, motions to dissolve (R. 34-35) were filed by them, together with affidavits (R. 36) supporting denial of the due execution and acknowledgment of the agreement and of compliance with conditions precedent contained in said agreement. To these defenses respondents replied that these questions were *res judicata,* having been determined in the case of *Burke* v. *Kleiman,* No. 567687, in the Superior Court of Cook County, Illinois (R. 44). The chancellor, Judge George Bristow, reserved rulings on the motions to dissolve of the petitioners and the plea of *res judicata* of respondents until a hearing on the merits (R. 54). The petitioners filed additional pleadings called rejoinders (R. 51-53, 65-71, 72), denying the rights of the respondents to plead estoppel by verdict, or *res judicata* and denying that the case or decree of *Burke* v. *Kleiman* could be lawfully raised as estoppel by judgment or as *res judicata* and stating that the application of *res judicata* would deprive them of their rights and property without due process of law, in violation of the 14th Amendment to the Federal Constitution.

Proof adduced at the trial on behalf of the petitioners showed that this alleged restrictive agreement never became operative or in full force and effect by its own terms; that the owners of not more than 54 per cent of the frontage involved executed the restrictive agreement (R. 150-151, 158-159, 185), although the agreement itself stated that it should not become operative until the owners of 95 per cent of the frontage executed it (R. 3). The proof further showed that none of the signatures to the alleged agreement was properly acknowledged, according

to the requirements of the laws of the State of Illinois (R. 144, 145, 189). The proof also showed that one of the signatories to the alleged covenant was Eva Somerman, who, as a witness for the respondents, said she signed the alleged restrictive agreement but did not acknowledge it (R. 92). The property involved in this suit and which was bought by Crook from the First National Bank of Englewood and thereafter sold by Crook to Hansberry, was owned by said Eva Somerman at the time the alleged agreement was executed by her (R. 92).

Proof further showed that the petitioner, Israel Katz, signed his name to a sheet of paper which was presented to him by a man who told him he was getting up a list of signatures for the improvement of the neighborhood. No acknowledgment was taken of Katz' signature by a Notary Public nor did the person who obtained his signature mention anything about a restriction against the sale of Katz' property. There is no evidence that Katz ever had any conversation with James Joseph Burke about the sale of his property at 6018 Vernon Avenue (R. 172), and the only evidence in the record as to any threat on the part of petitioner Katz to sell his property is to the effect that when he appeared at a hearing before the Department of Education and Registration in a proceeding against one William I. Sexton, a real estate broker, he was asked whether he would sell his property at 6018 Vernon Avenue to colored people and in reply, according to the testimony of Harry E. Raymond, one of the attorneys representing respondents in the court below, Katz said, "Yes, I would. I would sell it to anybody if I could get a buyer to purchase it; I would sell it now if I could." (R. 122.)

The proof further showed that the petitioner, Supreme Liberty Life Insurance Company, is an old-line legal

reserve life insurance company and that it made a first mortgage of $4,400.00 to Jay B. Crook and his wife on the premises here involved, and this loan was made in the regular course of business; that transactions involved in connection with this loan were all conducted by Crook with the Company officials; that neither Burke nor Hansberry participated therein. The testimony also showed that, among other things, as a part of its business the insurance company makes mortgage loans on property and that during the year 1937 approximately more than $144,000.00 worth of mortgages were made on premises of similar nature in the South Side community. The record also showed that prior to the making of the loan to Crook, the insurance company had the property appraised by several landowners in the City of Chicago who were experienced in the valuation of property and that the appraised value of the property ranged from $7,000.00 to $9,000.00. The petitioner, Harry H. Pace, is sued herein as the president of said Supreme Liberty Life Insurance Company (R. 13).

At the close of the evidence, the chancellor found that the owners of only about 54 per cent of the frontage had signed the agreement, which agreement itself contained the condition precedent that it should be of no force or effect unless signed by the owners of 95 per cent of the frontage (R. 78, 191-193, 198), but the chancellor in spite of his finding that the agreement was invalid by its own terms and had never come into effect, nevertheless, "reluctantly" held the question of the execution and effective validity of the agreement was *res judicata* by virtue of the decree in *Burke* v. *Kleiman*, and further held *Burke* v. *Kleiman* to be a representative suit binding upon the petitioners in the instant case. (This case of *Burke* v. *Kleiman* was affirmed in 1934 by the Appellate

Court of Illinois and reported in Vol. 277 at page 519, 189 N. E. 372.)

Notwithstanding the decree, the trial chancellor in his formal opinion (R. 191-194) rendered at the close of the case, used the following language:

> "In other words, there is an invalid agreement which is now sought to be enforced. And the answer that the plaintiffs make to that contention is not to try to show that it was properly signed by the requisite number of property owners, but that its validity has already been sustained by several courts. * * * We have a man named Burke, whose personality and activity enter into the picture. It is urged, and I think with a good deal of merit, that the lawsuit (*Burke* v. *Kleiman*) which he brought to test out the validity of the agreement was more or less a dummy proceeding, of which can be easily seen that although it appears on the face of which to be representative and class in its character, still it (*Burke* v. *Kleiman*) was concceived by him and prosecuted by him for the sole purpose of establishing the integrity and invulnerability of the district that is under the covenant; in other words, to make it unassailable. * * * And he in effect, says through himself and through those he was working with to bring about the destruction of this agreement, he says in effect, that lawsuit (*Burke* v. *Kleiman*) that I brought was a fraud, and I had no authority to represent the class, and I was not representing the class. It was my own personal lawsuit. I obtained the stipulation of the facts that the agreement contained the signatures of more than 95 per cent of the frontage, and that was all a fraud; and we know it was a fraud because the proof now shows that there wasn't 95 per cent. * * * He committed a fraud when he brought this lawsuit." (*Burke* v. *Kleiman.*)

The following are the material and pertinent facts in respect to the proceedings and the decree of *Burke* v. *Kleiman* (R. 218-246) pleaded by respondents as *res judicata*:

In October, 1932, Olive Ida Burke (wife of James J. Burke, one of the petitioners herein), owning a parcel of property at 6039 Vernon Avenue, Chicago, filed a suit in equity (R. 217, 218), purportedly on her own behalf and on behalf of all other property owners adversely affected by violation of the agreement therein mentioned, against Isaac Kleiman, owner of the premises at 417 E. Sixtieth Street, Chicago, Illinois (*not the property involved in the instant case*), Samuel Kleiman, owner of a mortgage note on said premises, Charles Sopkins, Trustee for the benefit of the owner of the mortgage note, and James Lowell Hall, a Negro tenant in said building, to enforce specifically by injunction, the same agreement sought to be enforced in the instant case.

No testimony was taken or proof adduced showing that the required frontage consent of 95 per cent had ever been obtained, but a stipulation was signed by Olive Ida Burke and by Charles J. Sopkins, an attorney who purported to act for himself and the other defendants (R. 46, 236). They merely stipulated that *95 per cent of the owners* of the property in said restricted area had signed, sealed and acknowledged said agreement (*not the owners of 95 per cent of frontage as required by the agreement*) *and that it was in full force and effect* (R. 46-47, 185, 236).

Prior to the execution of the above stipulation there was another stipulation entered into by the same counsel to the effect that the cause would be heard upon agreed facts to be stipulated without the necessity of taking oral evidence (R. 185).

A decree was entered in October, 1933, declaring said restrictive agreement to be in full force and effect and that it was a covenant running with the land and binding upon the defendants in that suit (R. 236-246), but the court did not find that it was a representative suit.

There were no other property owners or signers made parties defendant in the case of *Burke* v. *Kleiman,* except said Isaac Kleiman. The only property involved by the complaint was the property of Isaac Kleiman at 417 E. Sixtieth Street. Neither the petitioners nor any of their grantors were made parties to the proceedings of *Burke* v. *Kleiman.* There was no notice by publication or otherwise given to any of the other 500 or more property owners or signatories to the said alleged restrictive agreement. *The case was merely one where one property owner, Olive Ida Burke, not a signer of the restrictive agreement, was suing another property owner, Isaac Kleiman, not a signer of the agreement, to enforce the restrictive agreement* (R. 223, 224). The prayer of the complaint did not ask that the decree be binding upon any except the defendants against whom its enforcement was sought (R. 227-228).

Burke, former president of the Woodlawn Property Owners Association which filed the *Burke* v. *Kleiman* case, charged in his answer (R. 31-32) that the invalidity of the agreement was known to the Association at the time the several suits were conducted by it to enforce the agreement, which allegations were never rebutted by the respondents in the instant suit.

In the *Burke* v. *Kleiman* case, neither the due execution and acknowledgment of the agreement, the compliance with the conditions precedent contained therein, nor the validity of the agreement itself, were put in issue by the answers (R. 230-235) of the several defendants therein but their answers were confined to the sole unsubstantial and frivolous defense that violations in respect to three or four parcels, included in an agreement covering 500 or more parcels, constituted a change in the character of the neighborhood so as to make it inequitable to enforce the covenant (R. 230-235).

In the instant case, Isaac Kleiman and James Lowell Hall, parties defendant in the case of *Burke* v. *Kleiman,* both appeared and testified that they had not employed or authorized any lawyer to represent them in the case of *Burke* v. *Kleiman,* nor did they have any knowledge of any stipulation of facts, nor did they authorize its signing (R. 171). The chancellor in the court below in the instant case, after competent proof, found that the stipulation was a false stipulation, and that the case and proceedings of *Burke* v. *Kleiman* were collusive and fraudulent, and that the whole case was tainted with fraud (R. 84, 193). The affidavit (R. 203-6) executed by Fred L. Helman, the individual who attempted to create the restrictive agreement, shows that as early as February 1, 1929, which was three and a half years prior to the filing of the suit of *Burke* v. *Kleiman,* it was known by the Woodlawn Property Owners Association and its officials of which said Fred L. Helman was the executive secretary, that the alleged restrictive agreement was invalid according to its own terms, because the required frontage consents had not been obtained (R. 203-6). The record shows that the same Fred L. Helman, at Notary Public, took the acknowledgment of Olive Ida Burke to the complaint in the case of *Burke* v. *Kleiman* (R. 229-230). Helman's affidavit shows that it was known, at the time of the filing of said suit (October, 1932) by him and other officials of the Woodlawn Property Owners Association, that said restrictive agreement was invalid and had never come into force and effect according to its own terms, and that this knowledge was acquired three and a half years prior thereto.

Helman's affidavit likewise shows that he conferred with various officials of the Woodlawn Property Owners Association in regard to the filing of said case of *Burke*

v. *Kleiman,* and that he directed or caused to be paid to the attorneys representing Olive Ida Burke, the court costs for the filing of said case, and that he generally supervised the prosecution of said case up to the year 1933 when he severed his connection.

The decree in *Burke* v. *Kleiman* makes no mention of any representative or class suit (R. 236-246). Nor does the Appellate Court on appeal make any reference to its being a representative or class suit. (277 Ill. App. 519, 189 N. E. 372.)

In spite of the finding that the case and proceedings in *Burke* v. *Kleiman* were tainted with fraud and collusion, Chancellor Bristow in the *nisi prius* court, nevertheless reluctantly sustained the respondents' plea of *res judicata* (R. 191, 194) and thereupon in his decree (R. 72-88) sustained the objections of the respondents to the petitioners' answers and proceeded to declare the conveyance to the Hansberrys, void, and directed that upon the failure of the Hansberrys to convey their property to a white person, that a Master in Chancery of the court convey the same to Jay B. Crook, but said decree (R. 88) in no manner whatsoever provided for compensation to the Hansberrys. The chancellor enjoined Burke from selling or leasing any real estate within the alleged restrictive area to Negroes or to white persons for the purpose of selling or leasing to Negroes; enjoined Katz from selling or leasing his building at 6018 Vernon Avenue to Negroes; enjoined Pace and the Supreme Liberty Life Insurance Company from making any further loans on the real estate in the restricted area.

Inasmuch as a freehold was involved, the petitioners appealed directly to the Supreme Court of Illinois, being the highest court of the State. The Supreme Court of Illinois affirmed the judgment of the Circuit Court of

Cook County and thereupon, after denial of petition for rehearing, petitioners on March 11, 1940, filed a petition for certiorari in this Court to review the judgment of the Supreme Court of Illinois. Certiorari was granted by this Court on April 22, 1940.

SPECIFICATIONS OF ERRORS.

The Supreme Court of Illinois erred:

1. In affirming the decree of the Circuit Court of Cook County, Illinois, which found the case of *Burke* v. *Kleiman* to be a representative or class action, and in sustaining said decree as *res judicata* against the petitioners in the instant case.

(a) In affirming the decree of the Circuit Court of Cook County, Illinois, which found that *Burke* v. *Kleiman* was a class suit, although it found also that there never was a valid agreement and never in fact any class, and as a consequence, erred in sustaining the plea of *res judicata* on the basis of the decree of *Burke* v. *Kleiman*.

(b) And erred in not finding that the decree of *Burke* v. *Kleiman* was fraudulent, void, and entered without jurisdiction to bind any of the parties thereto or the petitioners.

2. In sustaining the plea of *res judicata* upon the basis of a decree and proceedings fraudulently and collusively brought and obtained.

3. In enforcing the harsh, oppressive and discriminatory restrictive agreement in deprivation of the petitioners' rights and property without due process of law, thereby denying the equal protection of the laws and abridging their privileges and immunities in violation of the 14th Amendment to the United States Constitution.

4. In enforcing the restrictive agreement against the petitioners in violation of Section 1977 and 1978 of the Revised United States Statutes.

5. In affirming the decree which deprived the Hansberrys of their property without compensation, in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

6. In affirming the decree enjoining Israel Katz in an arbitrary and capricious manner, and without any evidence whatsoever, in deprivation of his rights and property without due process of law in violation of the 14th Amendment to the Federal Constitution.

7. In affirming the decree which enforced a harsh, oppressive and discriminatory restrictive agreement, which is against the public policy of the United States as expressed in Sections 1977 and 1978 of the Revised United States Statutes, the Federal Bill of Rights and the 14th Amendment, and which is likewise contrary to the natural and inalienable rights of the petitioners as citizens of the United States, contrary to the general welfare, and contrary to the aims, purposes and objects and the Federal Constitution as expressed in its preamble to the 14th Amendment.

8. In affirming the decree enjoining Supreme Liberty Life Insurance Company, mortgagee, and Harry H. Pace, sued as its president, from making mortgage loans in said restricted area, although the agreement sought to be enforced expressly exempts mortgagees from its operation.

SUMMARY OF THE ARGUMENT.

I.

The affirmance by the State Supreme Court of the decree of the trial court in its wrongful application of the doctrine of *res judicata* denied the petitioners the benefit of notice in the instant suit and a real opportunity to appear, to be heard, and to defend, and so deprived each of the petitioners of his property without due process of law and denied to each of them the equal protection of the laws.

A.

The case of *Burke* v. *Kleiman,* held by the State Supreme Court to be a class or representative suit and *res judicata* against all the petitioners as to execution, acknowledgment and compliance with the conditions precedent to the restrictive agreement coming into effect, was not a class or representative suit. The case was one in which one property owner was suing another property owner to enforce the agreement to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement.

A property owners' restrictive agreement between 500 or more different owners owning 500 or more different and dissimilar parcels of real estate cannot be the subject matter of a class or representative suit, there being no common subject matter and no identity of interest among them.

The issue as to whether a property owner is bound is as to each inherently personal in respect to individual

execution and acknowledgment, and in respect to which no property owner can be represented.

In particular, among the personal defenses available to each owner in respect to the instant restrictive agreement was the defense that the undertaking of the owner was that he should not be bound unless the owners of 95 per cent of the frontage joined in the agreement. This personal defense is foreclosed by the use of the representative suit device.

A representative or class suit if permitted and sustained in such a case would destroy essentially these personal defenses, namely, forgery of signatures, fraud and trickery in obtaining signatures, alteration of the instrument, laches, waiver, abandonment, estoppel, and change in the character of the neighborhood in respect to each individual property owner which would render inequitable the enforcement of the purported agreement.

B.

The purported agreement involved in *Burke* v. *Kleiman* and in the instant suit provided that it was to be null and void and of no force and effect unless signed, sealed and acknowledged by the owners of 95 per cent of the frontage. The proof in the instant case, as found by the trial chancellor, showed that this condition precedent to validity was not complied with; consequently, no agreement ever came into force or effect and there was no class to be represented by anyone. The court had no jurisdiction to bind the petitioners and their privies who were not parties and not served with summons or process in said cause. The decree of *Burke* v. *Kleiman* was therefore void and could not be pleaded as *res judicata* against these petitioners.

II.

The petitioners were deprived of their rights and property without due process of law by the judgment of the Supreme Court of the State of Illinois in sustaining the decree of the lower court which applied against the petitioners as *res judicata* the case of *Burke* v. *Kleiman,* the proceedings and decree, in which were fraudulently and collusively brought and maintained as found by the trial chancellor.

There was fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that had actually been signed by the necessary owners of 95 per cent of the frontage, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed. Moreover, the said proceedings were fraudulently maintained by means of a false stipulation of facts that the required frontage consent had been obtained.

The false stipulation of facts was preceded by stipulation of counsel in said cause that a stipulation of fact would be entered into in lieu of evidence and the case tried upon the pleadings without the necessity of any proof of any sort.

Such a fraudulent proceeding and decree cannot be *res judicata* against anyone.

III.

The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary and contrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

A.

The effect of the decree was to take property away from the petitioners, Hansberrys, and give it to Crook, their predecessor in title and an alleged co-conspirator with them, without compensation.

(1) Due process under the Fourtenth Amendment includes the proposition that property shall not be taken from one person by State action, whether legislative, judicial or executive, and given to another, without compensation.

IV.

The decree of the State Courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

V.

The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee, and Harry H. Pace, sued as its president, was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.

VI.

The enforcement by the courts below of a restrictive agreement which prohibits Negroes from owning property on account of race or color, is State action within the meaning of the Fourteenth Amendment and therefore is in violation of said Amendment, in that it is a deprivation of rights and property without due process of law and constitutes a denial of equal protection of the laws.

A.

If the legislative branch as an arm of the State cannot separate persons in neighborhoods on the basis of color or race, as was held in the case of *Buchanan* v. *Warley*, 245 U. S. 60, it follows that the judicial branch as an arm of the State cannot do so.

B.

The enforcement of the restrictive agreement by the courts below abridges the rights, privileges and immunities of petitioners as citizens of the United States in violation of the Fourteenth Amendment.

ARGUMENT.

I.

The affirmance by the State Supreme Court of the decree of the trial court in its wrongful application of the doctrine of res judicata denied the petitioners the benefit of notice in the instant suit and a real opportunity to appear, to be heard, and to defend, and so deprived each of the petitioners of his property without due process of law and denied to each of them the equal protection of the laws.

Postal Cable Telegraph Co. v. *Newport,* 247 U. S. 464 at 476.

Brinkerhoff-Faris Trust and Savings Co. v. *Hill.* 281 U. S. 673, at 679-682.

Chase National Bank v. *Norwalk,* 291 U. S. 431.

Windsor v. *McVeigh,* 93 U. S. 274 at 277.

The application of the doctrine of *res judicata* against the petitioners in this cause is in direct opposition to the requirements of due process of law.

In *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464, at 476 the court says as follows:

> "The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privy, litigated, or has had an opportuity to litigate, the same matter in a former action in a court of competent jurisdiction. *Southern Pacific Railroad Company* v. *U. S.,* 168 U. S. 1, 48 Greenleaf Evidence, paragraph 522-523. The opportunity to be heard is an essential requirement in due process of law in judicial proceedings. *Windsor* v. *McVeigh,* 93 U. S. 274, 277; *Louisville & Nashville*

Railroad Company v. *Schmidt*, 177 U. S. 230, 236; *Simon* v. *Craft*, 182 U. S. 427, 436. And as a state may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (*Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Coe* v. *Armour Fertilizer*, 237 U. S. 413, 423), so it cannot without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor a privy with a party therein."

See also:

Brinkerhoff-Faris Trust and Savings Co. v. *Hill*, 281 U. S. 673, at 679-682.

Chase National Bank v. *Norwalk*, 291 U. S. 431.

Windsor v. *McVeigh*, 93 U. S. 274 at 277.

A.

The case of Burke v. Kleiman, held by the State Supreme Court to be a class or representative suit and res judicata against all the petitioners as to execution, acknowledgment and compliance with the conditions precedent to the restrictive agreement coming into effect, was not a class or representative suit. The case was one in which one property owner was suing another property owner to enforce the agreement to the injury and detriment of the latter and where there was a dispute, conflict of interest and diversity of opinion as to the enforcement of the agreement.

In October, 1932, Olive Ida Burke (wife of James Joseph Burke, one of the petitioners herein) owning a parcel of property at 6039 Vernon Avenue, Chicago, Illinois, filed a suit in equity (R. 217, 218) purportedly on her own behalf and on behalf of all other property owners adversely affected by violation of the agreement there-

inafter mentioned. The case was merely one where one property owner, not a signer of the restrictive agreement, was suing another property owner, not a signer of the agreement, to enforce the purported restrictive ageement (R. 223, 224). There were no other property owners or signers made parties defendant in the case of *Burke* v. *Kleiman* nor named as parties plaintiff (R. 217, 218). Neither the petitioners nor any of their grantors were made parties to the proceeding of *Burke* v. *Kleiman*. There was no notice by publication or otherwise given to any of the other 500 or more property owners or signatories to the said alleged restrictive agreement (R. 218, 228-229). The only property involved was the property of Isaac Kleiman at 417 E. Sixtieth Street (R. 224-223). The suit filed by Olive Ida Burke against Isaac Kleiman and the other defendants had for its object the enforcement of an alleged restrictive agreement. The prayer of the complaint merely sought to enforce the agreement against the defendant Kleiman's property at 417 E. Sixtieth Street, Chicago, Illinois; it did not seek to have the alleged agreement declared valid, binding and effective as to the other property, nor as to any other parties (R. 227-229).

The plaintiff, Olive Ida Burke, was suing Isaac Kleiman and was seeking relief against him and the other defendants in *a manner which would damage and injure Isaac Kleiman and the other defendants in respect to the property at 417 E. Sixtieth Street in which the defendants had an interest.* The plaintiff, Burke, could not in any sense represent the defendant, Kleiman, for the reason that the plaintiff, Burke, desired to enforce an agreement and the defendant, Kleiman, adversely desired *not* to enforce said alleged agreement; and there was a sharp conflict, difference, and diversity of interest and opinion

between the plaintiff on the one hand and the defendants on the other in respect to renting and selling property to Negroes. The case of *Burke* v. *Kleiman* could not possibly be a representative suit or class action for the reason that if it were such, there would be an anomalous situation where one member, Burke, of a class, would be suing another member, Kleiman, of the same class and representing him in the same suit. In other words, in actuality, the plaintiff, Burke, was not representing the defendant, Kleiman, in respect to any common *res* or common subject matter or common right or title for the benefit of all involved, but on the contrary was engaged in a supposed dispute involving a difference and diversity of interest, and conflict of interest between the plaintiff, Burke, and the defendant, Kleiman, on the matter of leasing the *one* parcel of property involved, owned by the Kleimans, to Negroes or colored people (R. 218-229). Because of the sharp conflict of interest between the parties in the case of *Burke* v. *Kleiman,* that case could not possibly be a representative or class action, and since neither the petitioners nor any of their grantors were parties to that action, nor served with summons or process, the decree of *Burke* v. *Kleiman* could not, in the absence of the petitioners or their grantors bind, conclude, and estop the petitioners or their grantors; and both the trial court and the Supreme Court of Illinois erred in finding that decree binding, thereby depriving the petitioners of their rights and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

This Court in the case of *Fayerweather* v. *Ritch,* 195 U. S. 276, had this to say in reference to the application of the principle of *res judicata*—page 276:

> "In *Chicago Burlington Railroad* v. *Chicago,* 166 U. S. 226, we held that the judgment of a State court

> might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were purportedly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process. We state: 'But a State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the Statute prescribing forms of procedure in the courts and give the parties in interest the fullest opportunity to be heard and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment has said: "Can a State make anything due process of law which by its own legislation chooses to declare such?" To affirm this is to hold that a prohibition to the States is of no avail or has no application where the invasion of private rights is effected under the forms of said legislation.' *Davidson* v. *New Orleans*, 96 U. S. 97, 102. The same question could be propounded and the same answer should be made in reference to judicial proceedings."

It is clear that the application of the principle of *res pudicata* necessarily involves decision as to whether or not the parties before the court in the case in which the principle is sought to be applied, have had notice and a fair opportunity to defend in former proceedings. It is clear, consequently, that this Honorable Court in protecting the rights of citizens to due process of law under the Fourteenth Amendment will review the applications of the principle of *res judicata* by state courts.

It is of course necessary that the court be especially vigilant in its review of state court applications of the principle of *res judicata* where the former proceedings sought to be used are purportedly representative suits. This court in the case of *The Wabash Railroad Company* v. *Adelbert College*, 208 U. S. 38 at page 58, has sounded

a warning in respect to the doctrine of *res judicata* in representative suits. There the court said: "The theory of the plea in bar is that the *Ham* suit was a representative or class suit, and that the judgment in it bound all of the class, even if they were not parties or privies to it. It was held otherwise by the Circuit Court of Appeals with respect to this very judgment, *Compton* v. *Jesup*, 68 Fed. Rep. 263, and in that opinion we concur. * * * 'The allegation that the suit is brought in behalf of all who should join and share in the expenses cannot make the judgment binding on those who do not join. Some may have differed over jurisdiction and some perhaps could not join without disturbing the diversity of citizenship, upon which alone the jurisdiction was based, or some possibly had never heard of the pendency of the suit. It is clear if such suits in the Circuit Courts of the United States could have the effect claimed for them and the judgments in them are binding in our courts against all other persons of the same class, that injustice might result, and even collusive suits might be encouraged.'"

The holding of the *Burke* v. *Kleiman* suit to be a representative suit and *res judicata* against the petitioners, deprived the petitioners of the benefit of notice and a real opportunity to defend. In *Windsor* v. *McVeigh*, 93 U. S. 274 at 277, the Court says: "A denial to the party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case the District Court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had

been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict clothed in the form of a judicial sentence."

A property owner's restrictive agreement between 500 or more different property owners owning 500 or more different and dissimilar pacels of real estate cannot be the subject matter of a class or representative suit, there being no common *res,* no common subject matter, and no identity of interest among them. In order to bring a representative suit there must be some common right, *res,* title or common subject matter or identical interest in all of the members of the class. See *Smith* v. *Swormstedt,* 16 How. 288 at 303; *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38 at pages 57-59; *Christoper* v. *Brusselback,* 302 U. S. 500 at 505; *Hale* v. *Hale,* 146 Ill. 227 at 258; *Weberpals* v. *Jenny,* 300 Ill. 157; *Saunders* v. *Poland Park Co.,* 198 Atl. 269.

The plaintiff who brings a class or representative suit must sue or defend for the benefit of *all.* A mere common interest in the question of *law or fact involved* is not enough upon which to base a representative or class suit. The fundamental principle in respect to the bringing and maintaining of class actions has been stated most forcibly by Pomeroy "Equity Jurisprudence," 4th Edition (1918), Volume 1, Section 268, page 498):

> "In that particular family of suits, whether brought on behalf of a numerous body against a single party, or by a single party against a numerous body, which are strictly and technically 'bills of peace,' in order that a court of equity may grant the relief and thus exercise its jurisdiction on the ground of preventing a multiplicity of suits, there does and must exist among the individuals composing the numerous body, or between each of them and their single adversary, a common *right,* a community of interest in the *subject matter of the controversy,* or a common *title* from which all their separate claims and all the questions

> at issue arise; it is not enough that, the claims of each individual being separate and distinct, there is a community of interest merely in a *question of law or of fact* involved, or in the *kind and form of remedy* demanded and obtained by or against each individual".

See: *Scott* v. *Donald*, 165 U. S. 107 at page 115 to 117, in which the language of Mr. Justice Nelson in the case of *Cutting* v. *Gilbert*, 5 Blatchford 259, 261 is quoted as follows:

> " 'This is a bill of peace to quiet the rights of parties, and put an end to further litigation. The bill is founded on the idea that all persons in business as brokers or as bankers doing business as brokers, charged with the tax in question, have such a unity or joinder in interest in contesting it, that all may join in the bill for that purpose; and that as the parties are so numerous as to make it inconvenient to join all of them, a determinate number may appear in the name of themselves and for all the rest. I have not been able to concur in this view. The interest that will allow parties to join in a bill of complaint, or that will enable the court to dispense with the presence of all the parties, when numerous, except a determinate number, is not only an interest in the question but one in common in the subject matter of the suit' ".

It is necessary again to observe that in the *Burke* v. *Kleiman* case, a purportedly representative suit applied as *res judicata* by the Illinois Supreme Court against the petitioners, one party, not a signer of the alleged agreement, was suing another party, not a signer of the alleged agreement, to enforce the same agreement. (R. 218-219.)

A property owner's restrictive covenant, which involves 500 or more different owners owning dissimilar parcels of real estate, all of which are differently situated,

some with mortgages upon them, and some free and clear of encumbrances, some heavily burdened by taxes, and some not, some large, and some small, some homes and residences and some apartment buildings and commercial properties, some owned by private individuals and others by banks and insurance companies, some close to and adjacent to colored people and some far away, some owned by minors, guardian or trustees, some owned by hotels or inns under the statutory duty imposed by the Civil Rights Act of the State of Illinois to admit all persons without regard to race or color, some owned by hospitals under a like statutory duty to admit all persons, some wishing to enforce the agreement and others not, inherently cannot be the subject matter of a representative or class action, because there can be no common or identical interest between the property owners, and because instead of one common subject matter, there are 500 or more different subject matters, and 500 or more measures of damages in respect to each alleged violation of the covenant.

In the instant case, the Supreme Court of Illinois affirmed a decree which held a suit to be representative where the plaintiff Burke was suing another member of a class whom the plaintiff purported to represent. An allegation in a complaint, that a plaintiff brings the action on behalf of himself and all others similarly situated, does not in itself make an action a class suit. See *Wabash Railway Co.* v. *Adelbert College*, 208 U. S. 38 at 57-59; *Hammer* v. *New York Railway Co.*, 244 U. S. 266 at 273.

The issue as to whether a property owner is bound is as to *each*, inherently personal in respect to individual execution and acknowledgment, in respect to which latter facts *no property owner con be represented.* Among the personal defenses available to *each owner* in respect to

the instant restrictive agreement, was the defense that the undertaking or promise or covenant of the owner was that he should be bound *only if the owners of 95% of the frontage joined in the purported agreement.*

A representative or class suit if permitted and sustained in a restrictive covenant suit involving 500 or more parcels of property and 500 or more different owners would destroy essentially all the personal defenses to which each owner is entitled, namely: forgery of signatures, fraud and trickery in obtaining signatures, signing upon the condition that a certain number of other owners would sign, alteration of the instrument, laches, waiver, abandonment, estoppel, and change in the character of the neighborhood which would render inequitable the enforcement of the purported agreement. Each individual party signatory is entitled to prove as to these, not only in respect to himself but in respect to all other purported parties signatory, by whom and with whom he is sought to be bound. He is entitled to require proof of or to disprove the existence of the agreement.

The wrongful application by the Illinois Supreme Court and by the lower court of the doctrine of *res judicata* against the petitioners herein deprived the petitioners of their rights and property without due process of law in violation of Section 1 of the 14th Amendment to the Federal Constitution because the wrongful sustaining of the respondents' plea of *res judicata* on the theory of a supposed representative or class suit prevented these petitioners from utilizing the above mentioned personal defenses to which each owner was lawfully entitled under the laws of the State of Illinois, and as a consequence the petitioners were wrongfully deprived of notice and a real opportunity to appear, to be heard, and to defend. The petitioners, as well, as a consequence were denied the

equal protection of the laws of the State of Illinois. See *Postal Cable Telegraph Co.* v. *Newport,* 247 U. S. 464 at 476; *Wabash Railroad Co.* v. *Adelbert College,* 208 U. S. 38 at 58; *Windsor* v. *McVeigh,* 93 U. S. 274 at 277; *Earle* v. *McVeigh,* 91 U. S. 503 at 507; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 at 679-682.

The effect upon the petitioners' rights to utilize the personal defenses available to them, and for that matter, upon the rights of any alleged parties signatory to a restrictive agreement, of the application of the principle of *res judicata* by means of the device of holding former proceedings to have been representative or class in character, is illustrated by the record in the instant case. The respondents' witness, Eva Sommerman, the predecessor in title of the petitioners' Hansberry, who owned the property involved in this suit at the time of the circulation of the alleged restrictive agreement among the property owners, testified that she signed the agreement, Plaintiff's Exhibit 5 (R. 315, 318), but stated upon cross-examination: "I don't know what an acknowledgment is. I didn't go through any formality of signing it or acknowledging it. I didn't take any oath in respect to it." (R. 92.)

The petitioner, Israel Katz, testified as follows: "My signature appears on page 19 of Plaintiffs' Exhibit 5, and never to my knowledge did I sign that document. I signed the sheet upon which my name appeared which was presented to me with 2 or 3 sheets of paper. A man told me he was getting up a list of signatures for the improvement of the neighborhood. He did not tell me he was a Notary Public, nor did he say anything about restrictions against the sale of my property. I am familiar with the manner of taking acknowledgments to deeds and nothing like that appeared. I know this sheet

wasn't a deed. When I signed it no one explained the contents of the instrument to me, nor did the man who presented the instrument say anything about any agreement." (R. 172.)

The record in the State Supreme Court shows innumerable instances (which were pointed out both to the lower court and the Illinois Supreme Court) where the individual purported parties signatory could have made substantial defenses in suits brought against them individually to enforce the agreement, such as, their purported obligation under the instrument, including such defenses as erasures, forgery, fraud and trickery in obtaining signatures; lack of authority of purported agents, officers of corporations, trustees with testamentary or other powers, guardians, minors, and the like; lack of the required statutory personal knowledge of the Notary Public as to the identity of the signer and of the signer as the owner of the identical property involved. (R. 92, 93, 96, 145, 159-171, 172, 185-188, 203-4.)

It is well worth observing that the defense of improper acknowledgment in the instant case was available to each of the parties signatory by reason of the fact that the purported signatures to the agreement are *wholly unconnected and separated from the purported acknowledgments* which do not appear and are not attached to the *same* document or paper upon which the signatures appear. (R. 315-325.) (Note—there were four exhibits, Plaintiff's Exhibits 5, 5a, 5b and 5c, recorded respectively as 9914711, 9914713, 9914714, 9914712; R. 144, 142-145.)

The petitioners in this cause, and *ipso facto* all other purported parties signatory to the purported restrictive agreement, were by application of the doctrine of *res judicata* through the *Burke* v. *Kleiman* proceeding precluded from the defenses hereinabove set out. The trial

court overruled the objections of the petitioners to the admission of Plaintiffs' Exhibit 5 and, as well, concluded the petitioners against proof, in the decree of the court overruling said objections as aforesaid and applying the doctrine of *res judicata,* and thereby denying the petitioners due process of law and the equal protection of the laws.

The personal defenses hereinabove discussed are as a matter of state law available in the trial of civil cases involving contracts in the courts of the State of Illinois. They are a part of the common law adopted by most of the states of the Union. Reference is made to the Notes and Comments upon the decision of the State Supreme Court now being reviewed in this cause. See University of Chicago Law Review, Vol, 7, No. 3 (April, 1940) Pages 563-567; Illinois Law Review, Vol. 25 (June, 1940) No. 2, Pages 213-218.

The peculiarly personal defenses available to each purported signer cannot be determined in a representative or class proceeding and no signer to any such restrictive agreement can be represented by any other signer in respect to such defenses personal to each signer. See *Christopher* v. *Brusselback,* 302 U. S. 500 at 504-5. The provision in the purported agreement to the effect that "This agreement and the restrictions herein contained shall be of no force or effect unless this agreement or a substantially similar agreement shall be signed by the owners above enumerated of 95% of the frontage above described" and other conditions precedent contained therein, emphasize the retention of the right by each individual signer to contest the validity of the agreement in every respect. The agreement contained no power to confess a judgment or decree.

It is a well settled principle of law as announced by

this court in numerous cases that mere numerousness of parties is not sufficient for the bringing and maintaining of a representative or class suit. See *Matthews* v. *Rodgers*, 284 U. S. 521 at 529-30; *Hale* v. *Allinson*, 188 U. S. 56 at 77, *et seq.*; *St. Louis Iron Mountain and Southern Ry. Co.* v. *McKnight*, 244 U. S. 368 at 375; *Kelley* v. *Gill*, 245 U. S. 116 to 120.

We respectfully call to the attention of the court the statement of Mr. Justice Shaw in his dissenting opinion to the decision of the Illinois State Supreme Court now on review in this court as follows:

> "The opinion in this case states that the defendants were so numerous that it would have imposed an unreasonable hardship and burden to make them all parties to the suit. This is a definite overruling of *Whitney* v. *Mayo*, 15 Ill. 251. It is true that there were 500 defendants, but even the humblest of these 500 had a right to his day in court, to be made a party to the suit and to be given an opportunity to defend it. Their names were on the public records of Cook County and not the slightest excuse appears for not making them parties to the suit. If one sought to bind all the property in the City of Chicago by some restrictive covenant he would assume the burden of making every property owner in that city a party to the suit, either by name or as unknown owner, if he was, in fact, unknown. He could not gain an advantage for himself through a fraudulent scheme simply by saying they were too numerous to mention." (R. 333-4.)

B.

The purported agreement involved in Burke v. Kleiman and in the instant suit provided that it was to be null and void and of no force and effect unless signed, sealed and acknowledged by the owners of 95 per cent of the frontage. The proof in the instant case, as found by the trial chancellor, showed that this condition precedent to validity was not complied with; consequently, no agreement ever came into force or effect and there was no class to be represented by anyone. The court had no jurisdiction to bind the petitioners and their privies who were not parties and not served with summons or process in said cause. The decree of Burke v. Kleiman was therefore void and could not be pleaded as res judicata against these petitioners.

The trial chancellor Bristow, found that the restrictive agreement involved in this case and in *Burke* v. v. *Kleiman*, was an invalid agreement because the required frontage consent of the owners of 95% of the frontage had never been obtained, but only 55%. (R. 191-199.) Although the Chancellor found that the condition precedent of frontage consent of 95% had never been complied with, he nevertheless enforced the non-existent restrictive agreement (invalid and non-existent according to its own terms) by holding and finding that the case of *Burke* v. *Kleiman* was a representative or class action, and therefore, all the defenses, such as lack of due and proper execution, failure to comply with the condition precedent in the instrument, fraud and trickery in the obtaining of signatures, alteration of the instrument and the erasure of names, laches, abandonment, estoppel and change in the character of the neighborhood, all raised by the petitioners herein, were

precluded and could not be properly raised by the petitioners, because the plea of *res judicata* was properly invoked by the respondents.

In the instant case (and in the case of *Burke* v. *Kleiman*) the court made an agreement for the parties and specifically enforced a non-existent agreement by specific performance and granted a harsh mandatory injunction against the petitioners Hansberry, although neither the petitioners nor their privies, had been parties to the proceedings of *Burke* v. *Kleiman,* nor served with summons, process or notice in said cause.

The record in this case affirmatively shows that the court never acquired jurisdiction in the case of *Burke* v. *Kleiman* over any subject matter of that lawsuit, because there was in fact no restrictive agreement whatsoever according to the terms of the instrument purported to be enforced by the decree of *Burke* v. *Kleiman.* The court had no authority, right or jurisdiction whatsoever to enforce an agreement which did not exist, and the judgment and decree in the case of *Burke* v. *Kleiman* is therefore void for want of jurisdiction, and such a void judgment or decree could not be pleaded as *res judicata* against the petitioners herein. See *Scott* v. *McNeal,* 154 U. S. 34 at 48 to 51.

In the case of *Scott* v. *McNeal,* this court held that a probate proceeding upon a *living person* was void for want of jurisdiction, and that to give effect to such a proceeding even in the name of a State was a denial of due process of law. Similarly, the courts of the State of Illinois had no jurisdiction whatsoever to enforce a non-existent restrictive agreement, there being no *subject matter* upon which the jurisdiction of any court might attach. See *Galpin* v. *Page,* 18 Wall, 350 at 365 and 366; *Old Wayne Life Association* v. *McDonough,* 204 U. S. 8 at pages 14-18, 22 and 23.

The record of *Burke* v. *Kleiman* itself affirmatively establishes the invalidity of the judgment or decree in that case. The complaint in the case of *Burke* v. *Kleiman* states that "said agreement was signed by the *owners of 95 percentum of the frontage described therein*". There was no evidence taken in said cause, but the attorney for the plaintiff, Olive Ida Burke, and the alleged attorney (but wholly unauthorized as will be shown by the record (R. 171), for the defendants), stipulated that the cause be heard upon agreed facts to be stipulated without the necessity of taking oral evidence (R. 185). In accordance with this stipulation, another stipulation of agreed facts was executed with the same lack of authority by the same attorneys, and said stipulated or agreed facts *merely* recites the following: "That, on, to-wit, the 30th day of September, 1927, about five hundred or over white persons duly executed and entered into a restrictive agreement described in the bill of complaint herein, *said white persons constituting and comprising more than the 95% of the then owners of said frontage described in said agreement*". (R. 236-243.) The decree in the case of *Burke* v. *Kleiman* merely recites the foregoing statement to the effect that the agreement had been signed by *95% of the owners.* (R. 236.) The decree in *Burke* v. *Kleiman* (R. 263 to 246), likewise finds *that the stipulated facts constituted the evidence* in the cause of *Burke* v. *Kleiman.* (R. 243.) The stipulated or agreed facts (R. 236) fail to show that *95% of the owners* executed the agreement. The decree of *Burke* v. *Kleiman* merely shows that *95% of the owners* executed the agreement. (R. 236.) Consequently, the proceedings and decree in the case of *Burke* v. *Kleiman* show and prove affirmatively upon their face the entire and complete lack and want of jurisdiction in the court to enter any decree enforcing any agreement. There is a complete

lack of facts and findings in the stipulated agreed facts or in the decree to establish the central and prime allegation in the complaint (R. 223) to the effect that the owners of 95% executed the agreement.

It is quite easy to see that 95% of the owners of the area might not own 95% of the frontage, or to state it another way, that 95% of the owners might own only 50% or 60% of the frontage. In the light of the fraud and collusion in the case of *Burke* v. *Kleiman,* as shown by the record in this case (as hereafter shown), the court can easily see that the recital in the stipulated or agreed facts that 95% of the owners executed the agreement, was not a mere inadvertence.

It has always been held by this court that a judgment void for want of jurisdiction may be collaterally attacked at any time and in any court. See *Galpin* v. *Page,* 18 Wall. 350 at 366 and 367. In order to render a valid judgment, a court must have jurisdiction of the subject matter as well as the parties. In the case of *Burke* v. *Kleiman* there was entire lack of jurisdiction over any subject matter, there being in fact no agreement whatsoever to enforce. This court has held that presumptions will not be indulged in to supply a proper or valid subject matter or jurisdictional facts where the evidence and record in the case show that the contrary appears. This rule of law has been stated by Justice Field in the case of *Galpin* v. *Page,* 18 Wall. 350 at 366, where the following language was used:

> "But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration

> when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred."

The proceedings, that is, the stipulation and agreed facts and the decree containing said stipulated and agreed facts in the case of *Burke* v. *Kleiman* affirmatively shows the entire absence of a restrictive agreement, which depended for its validity upon the compliance with the condition precedent contained therein, namely: Execution of the instrument by the owners of 95% of the frontage. No presumption can be indulged in to supply the absence of the finding of compliance with the condition precedent in the instrument, which could not become an agreement until the owners of 95% had signed, sealed, executed and delivered the same. The void judgment and decree in the case of *Burke* v. *Kleiman* could not be pleaded against the petitioners as *res judicata.* See *Thompson* v. *Whitman,* 18 Wall. 457 at 468 to 470; *Old Wayne Life Association* v. *McDonough,* 204 U. S. 8 at Pages 14 to 17, 22 to 23.

II.

The petitioners were deprived of their rights and property without due process of law by the judgment of the Supreme Court of the State of Illinois in sustaining the decree of the lower court which applied against the petitioners as res judicata the case of Burke v. Kleiman, the proceedings and decree in which were fraudulently and collusively brought and maintained, as found by the trial chancellor.

There was fraud going to the jurisdiction of the court in the very basic and essential allegation that there was a valid agreement that had actually been signed by the necessary owners of 95 per cent of the frontage, and fraud in the jurisdictional allegation that there was a class to be represented when, in fact, no such class ever existed. Moreover, the said proceedings were fraudulently maintained by means of a false stipulation of facts that the required frontage consent had been obtained.

The false stipulation of facts was preceded by stipulation of counsel in said cause that a stipulation of fact would be entered into in lieu of evidence and the case tried upon the pleadings without the necessity of any proof of any sort.

Such a fraudulent proceedings and decree canot be res judicata against anyone.

The Chancellor in the lower court who heard and considered all of the evidence in respect to the fraudulent and collusive character of the *Burke* v. *Kleiman* suit, found that the suit was a fraudulent and collusive proceeding conducted to establish the invulnerability of the district, that to make the district unassailable the suit was

brought to test the validity of the agreement and to have judicial determination of that fact. (R. 192-193.)

We can follow the fraud in connection with the attempt to establish this invalid agreement as valid in law, in sequence by the record before this court.

One Helman, was the Executive Secretary of the Woodlawn Property Owners' Association, the Association organized to promote and establish the agreement. (R. 142, 203.) He took most of the acknowledgments to the purported agreement. He had knowledge that the agreement had not come into effect by its terms. He supervised the institution and filing of the *Burke* v. *Kleiman* proceedings. All of these facts are set out and shown in an uncontradicted affidavit filed in this cause in support of a motion and petition of the petitioners to vacate and set aside the decree in this cause, all of which were a part of the record before the Illinois Supreme Court at the time that it reviewed and affirmed the proceedings and decree of the lower court.

Helman, who had knowledge that the agreement was invalid, took the acknowledgment to the complaint which Olive Ida Burke made upon information and belief. (R. 203, 204, 229-30.)

Perfunctory answers were filed on behalf of all the defendants, and in none of the answers was issue taken upon the due execution and acknowledgment of the agreement sued upon or upon compliance with the condition precedent contained therein. (R. 230-235.)

Isaac Kleiman, and James Lowell Hall, testified that they did not employ any lawyers to represent them (R. 171-172), and had not authorized any lawyer to sign a stipulation in their behalf. Notwithstanding, a stipulation was entered into by Charles J. Sopkin, a lawyer and

one of the defendants, in behalf of all the defendants, with the attorney for the plaintiff, that the case should be tried on a stipulation of facts without the necessity of producing oral evidence. A stipulation was subsequently entered into stipulating facts to be considered as evidence, including the false stipulation as to the due execution and acknowledgment of the agreement and compliance with conditions precedent contained therein. The decree erroneously, consistent with the erroneous stipulation in the stipulated facts, found that 95% of the owners of said frontage had executed and entered into the agreement and not the owners of 95% of the frontage, as required by the agreement. The prayer of the plaintiff's complaint did not ask that the agreement be found valid, and the ordering part of *Burke* v. *Kleiman* decree merely enforced it against the named defendants. (R. 185, 227, 236-46.)

The fraudulent character of *Burke* v. *Kleiman* proceedings, under attack by the petitioners when pleaded by the respondents as *res judicata,* was patent from the pleadings in the *Burke* v. *Kleiman* case, and the evidence adduced in *Lee* v. *Hansberry* hearing.

There was no real controversy between the parties nominally opposed to each other, and the litigation was in fact carried on under the direction and control of the plaintiff and the Woodlawn Property Owners' Association and its employees engaged in conducting the project of establishing the restricted area and the invalid restrictive agreement.

It is well settled that this court will review applications of the doctrine of *res judicata* and this court is of course, especially diligent in its examination of the application of *res judicata* in respect to proceedings sought to be used

as *res judicata* and which bear hall-marks of fraud. See *Hatfield* v. *King,* 184 U. S. 162; *Geter* v. *Hewitt,* 22 How. 364.

This court has made a capital statement in respect to fraudulent and collusive suits. In the case of *Lord* v. *Veasie,* 8 How. 251, the court speaking through Mr. Chief Justice Taney in respect to a fraudulent suit, used the following language:

> "Page 253: The court is satisfied, upon examining the records of this case, and the affidavits filed and the motion to dismiss, that the contract set out in the pleadings was made for the purpose of instituting this suit, and that there is no real dispute between the plaintiff and the defendant. On the contrary, it is evident that their interest in the question brought here for decision, is one and the same, and not adverse; and that in these proceedings, the plaintiff and defendant are attempting to procure the opinion of this court upon a question of law, in the decision of which they have a common interest opposed to that of other persons, who are not parties to this suit, who had no knowledge of it while it was pending in the Circuit Court and no opportunity of being heard there in defense of their rights. And their conduct is the more objectionable because they have brought up the question upon a statement of facts agreed on between themselves, without the knowledge of the parties with whom they were in truth in dispute and upon a judgment *pro forma.* * * *"

The circumstances of fraud exhibited in *Burke* v. *Kleiman* proceeding illustrate the vice of holding suits and proceedings not truly representative in character as *res judicata* against persons without notice and a real opportunity to defend in respect to vital issues affecting their rights and property.

The Illinois State Supreme Court in its review of the proceedings in the instant cause, without modifying the decree of the lower court, stated that the charges of

fraud made by the petitioners were unsupported by the evidence. The opinion of the court referred to the fact that the charges were made in the answer of the petitioner, Burke, and that he appeared to have had part in the fraud, if any, in the *Burke* v. *Kleiman* proceedings. The affidavit of Helman, which was before the court at the time of its review of the lower court's proceedings, definitely showed that the *Burke* v. *Kleiman* proceedings were conducted under his and the Woodlawn Property Owners' Association's supervision. The record further showed that the plaintiff, Olive Ida Burke, was herself not a party signatory to the agreement, and that neither she nor Burke were necessarily informed of the fraud in the initiation of the agreement, its illegal recordation and the facts indicating fraud now exposed in the proceedings in the instant suit. (R. 218-247.) It should be noted that the answer of James Joseph Burke was under oath as true in substance and in fact and that the denial of the charges contained in the Burke answer was made in the reply signed by the attorneys for plaintiffs. (R. 43-49.)

Reference is made to the dissenting opinion of Mr. Justice Shaw in the instant case. *Burke* v. *Kleiman* proceedings were fraudulent and fraud attached to the jurisdiction of the court and tainted the entire proceedings, and so rendered the same void when attacked by the petitioners on the record as shown herein.

III.

The decree of the State Courts which deprived the Hansberrys of their property without compensation was so arbitrary to law as to amount to a mere spoliation in violation of their rights to due process of law under the 14th Amendment to the Federal Constitution.

The decree entered by the Chancellor in the trial court deprived the petitioners of their rights in the arbitrary seizure of their property by a Master in Chancery of the Superior Court of Cook County, Illinois. The result of this action was the forceful transfer of the property of one citizen to another. (R. 88.) That this harsh and oppressive action is violative of the Fourteenth Amendment is readily apparent. In support of this proposition note the case of *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226, Pages 236, 237, to this effect:

> "The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be permitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

See also *Missouri Pacific Railway* v. *Nebraska*, 164 U. S. 403.

The mere formal due process cannot convert the action of the State Courts into constitutional procedure. Legislatures have come to learn that under ordinary circumstances property cannot be taken without compensation. *Chicago, Burlington & Quincy Railroad* v. *Chicago*, 166 U. S. 226 at 241. If Legislatures are prohibited from arbitrarily seizing property, then the courts suffer the same regulations and prohibitions. To contend in the instant case that the Hansberrys had due process when their property was arbitrarily transferred to Jay B. Crook, would be a travesty. Crook was Hansberry's predecessor in title and an alleged co-conspirator. (R. 8.) The Court thus not only arbitrarily divested the Hansberrys of their title but reinvested title in Crook who had received good and valuable consideration. The arbitrary nature of the proceeding is further noted on an examination of the restrictive agreement which was the basis of the proceedings below. No where in the agreement is a forfeiture provided. (R. 316-317.)

If due process under the Fourteenth Amendment has any meaning, it certainly includes the proposition that property shall not be taken from one person by State action whether legislative, judicial or executive, and given to another without compensation, particularly as here, where the person to whom the property was given stood in the same position as the individuals who were divested of their title.

Chicago, Burlington & Quincy Railroad v. *Chicago*, 166 U. S. 226 at 233-234.

IV.

The decree of the State Courts enjoining Israel Katz, having been entered without any evidence whatsoever, is so plainly arbitrary and contrary to law, as to amount to a mere spoliation of the petitioner Katz and as a consequence was an arbitrary and capricious judicial seizure of his property and a denial of his rights without due process of law in violation of the 14th Amendment to the Federal Constitution.

The complaint of the respondents charged that the petitioner Katz, listed his property for sale with James J. Burke, and that he made threats to sell his property to colored people. Katz testified that he never at any time had any conversation with James J. Burke about the sale of his property at 6018 Vernon Avenue (R. 172-173) *and this fact was never rebutted in any manner whatsoever by the respondents.* The complaint also charged that Katz made threats to sell his property. (R. 12-13.) No threats by Katz whatsoever were ever proved. The respondents merely offered the following things as evidence of threats by Katz: That Katz was subpoenaed as a witness in a proceeding before the State Department of Registration and Education in February or July, 1937, according to respondents' witness Raymond (R. 122); that while testifying as a witness in this proceeding against William I. Sexton, a real estate broker, Attorney Harry E. Raymond, one of the attorneys for the respondents as shown by the record in this case, and one of the attorneys for the plaintiff in the case of *Burke* v. *Kleiman* asked Katz the following question: "Would you sell your property at 6018 Vernon Avenue to colored people, notwithstanding the agreement that is recorded in the particular district, Washington Park District, in which your prop-

erty is located, and in which you the owner, then owner of this property was a signer for yourself?" And Katz said: "Yes, I would. I would sell it to anybody that I could get to purchase it. I would sell it now if I could." This was not a threat, but was an answer elicited by the respondents themselves or their agents from a witness who was subpoenaed by them and who was answering a *hypothetical* question put by their attorney. In other words, the only evidence in the record as to any threat is a *privileged* statement made by the petitioner Katz, and *induced* by the respondents themselves while upon the witness stand in another proceeding in February, 1937, or July, 1937, as stated by the witness Raymond. (R. 122.) The witness Raymond was in utter confusion as to the date of this testimony by the petitioner Katz, and testified that it was made either February, 1937, which was at least four months prior to the filing of the injunction suit or in July, 1937, which would have been after the filing of the complaint in this cause, which was filed on June 7, 1937.

In other words, the supposed statement of Katz was not of such imminent or immediate pending nature that an injunction was necessary to protect the rights, if any, of the respondents. A substantial Federal right has been denied the petitioner Katz, and a decree of injunction has been issued against him without any real basis of evidence. In order to determine the violation of the Federal right asserted by the petitioner Katz, we submit that the court should examine the record for that purpose. See *Norris* v. *Alabama*, 294 U. S. 587 at 590; *Creswill* v. *Knights of Pythias*, 225 U. S. 246 at 261; *Traux* v. *Corrigan*, 257 U. S. 312 at 324-325.

The enforcement of the decree against the petitioner Katz, likewise deprived him of his fundamental rights

as a citizen of the United States to deal with property rightfully belonging to him. The harsh and injudicious manner in which his property rights were affected divested him in effect of his property in view of the change in the character of the surrounding neighborhood which made it impossible for the petitioner to use his property in a manner consonant with complete ownership. (R. 180-184.)

V.

The decree enjoining Supreme Liberty Life Insurance Company, as mortgagee and Harry H. Pace, sued as its president, was manifestly erroneous and so unreasonable and arbitrary as to deny these petitioners of their rights and property without due process of law, particularly in that the agreement sought to be enforced specifically exempted mortgagees from its operation.

Not having purchased any property in the area and having acted only in a manner entirely lawful and permitted even under the alleged agreement and being authorized under the laws of the State of Illinois to make mortgages on real estate, the arbitrary act of the court in applying the doctrine of *res adjudicata* was not merely erroneous but deprived the petitioner Supreme Liberty Life Insurance Co. of its substantial, substantive rights and seriously interfered with and hampered its competitive opportunities to make earnings from investments. Certainly the petitioners Pace and the Supreme Liberty Life Insurance Co. had the right to be heard on the question whether this alleged covenant had ever been executed by the owners of 95% of the frontage in the area involved, but the court denied them such right when it sustained the plea of *res adjudicata* interposed by respondents. Petitioners were charged with conspiring to violate a covenant, which by the evidence adduced at the trial was

shown conclusively and indubitably never to have existed. This was a direct denial of due process and we submit that such action cannot be contenanced by the highest tribunal of our nation.

Chicago, Burlington and Quincy v. *Chicago,* 166 U. S. 226.

VI.

The enforcement of the restrictive agreement by the courts below abridged the rights, privileges and immunities of petitioners as citizens of the United States in violation of the Fourteenth Amendment.

It is well settled that the prohibitions of the Fourteenth Amendment were designed to protect the newly emancipated Negro so that he would stand on an equal footing with all other American citizens before the law. Though the language is prohibitory, every prohibition implies the existence of rights and immunities, prominent among which is the imuunity from inequality of legal protection, either for life, liberty, or property. Any denial or abridgement of these fundamental immunities is certainly in conflict with the Constitution. (*Strauder* v. *West Virginia,* 100 U. S. 303, 308.)

That the prohibitions of the Fourteenth Amendment refer to all branches of the government is self-evident. *Chicago, Burlington and Quincy* v. *Chicago,* 166 U. S. 226, Mr. Justice Harlan speaking for the court in that case said on pp. 233, 234:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and

for the State, and is clothed with the States' power, his act is that of the State."

In the case at bar, the enforcement of the decree by specific performance and the subsequent seizure of the property of the petitioners Hansberry was state action in that the Chancellor and the Master in Chancery were properly constituted officers and agents of the State. See *Ex parte Virginia,* 100 U. S. 339; *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682; *Carter* v. *Texas,* 177 U. S. 4422. The use of the agencies of the state was contemplated by the framers of the restrictive agreement. It is not only provided that the courts of the state were to be used for purposes of enforcement but also that certain offices of the state were likewise to be utilized to breathe life into the instrument. The agreement provided that it should be of no force or effect unless it was recorded in the office of the Recorder of Deeds of Cook County, Illinois. (R. 316.)

That the enforcement of the restrictive agreement was state action cannot be doubted when the Chancellor in effect made himself an interested party to the extent of rewriting the instrument to include a forfeiture provisions that the framers did not intend. (R. 316.) This affirmative action, coupled with that of the Master in Chancery who executed the conveyance from Hansberry to Crook, effectively denied the petitioners their rights under the Fourteenth Amendment. This action creates a situation somewhat analogous to that in *Scott* v. *McNeal,* 154 U. S. 34, where the court held that a judgment of the highest court of a State, by which a purchaser at an administration sale, under an order of a probate court, acquired land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to

the Fourteenth Amendment. In the instant case, by a judgment of the lower court, affirmed by the highest court of the state, we find title to realty being taken by the state.

Unless by some superogation recently arrived at, if the state through the legislative branch cannot separate persons in neighborhoods on the basis of color or race, as was held in *Buchanan* v. *Warley,* 245 U. S. 60, it follows that the judicial branch as an arm of the state cannot do so. Such a decree by the judiciary would have all the force of a statute and would have behind it the sovereign power of the state. It would not be the plaintiffs in the case below speaking but the sovereign itself through the courts, telling the petitioners of a new law-making power that could invalidate and hold as a nullity a prior decision of this court. *Buchanan* v. *Warley, supra.* It would indeed be narrow and strained to deny the exercise of power to segregate races to the legislative branch on the one hand and permit the judicial on the other to give legal sanction to segregation. Such a course would be unsettling in the extreme at a time when the body politic can stand few more such extreme shocks.

The petitioners as citizens of the United States have a national citizenship that has been seriously impaired by the action of the state courts. Citizenship is dual in nature. An individual may be both a citizen of a state and also a citizen of the United States, but certainly the sta tes can in no wise impair the paramount national citizenship. Note the language of *Colgate* v. *Harvey,* 296 U. S. 404 at 427, where the court through Mr. Justice Sutherland stated:

> "Thus, the dual character of our citizenship is made plainly apparent. That is to say, a citizen of the United States is *ipso facto* and at the same time a citizen of the state in which he resides. And while

> the Fourteenth Amendment does not *create* a national citizenship, it has the effect of making that citizenship 'paramount and dominant' instead of 'derivative and dependent' upon state citizenship."

The action of the Chancellor in the instant case, as well as the activity of his Master in Chancery, in the enforcement of the decree ordering specific performance of the covenant and likewise depriving the petitioners Hansberry of their property, in effect reversed the true order of priority of citizenship. We have the situation of the state, through its duly constituted agents, issuing a mandate to citizens of the United States in a manner that sets back the orderly development of the constitutional law of both this country and of England. A right to live and a place in which to live are certainly two of the fundamental rights of man, each interdependent upon the other. If there is any meaning to the concept of citizenship, or to the idea of natural and inalienable rights, that meaning has been confounded and flaunted by the unnatural and unconstitutional action of the state courts.

To hold that free citizens cannot own property, or for that matter, can be restricted in the essential element of ownership, namely use(a distinction which Mr. Joseph Warren in 34 Harvard Law Review, 639 at 653, called specious) is to turn the clock back beyond the Statute of 13 Edward I. c. I., De donis, the Mortmain acts and the other splendid efforts to increase the free ownership and transfer of land.

If an ordinance forbidding the distribution of printed matter and the withholding of permits for public meetings in streets and other public places was unconstitutional (Haguev. C. I. O. 307 U. S. 496), then how much more offensive is the action of the state through its officers in the instant case in denying the right to live to

a people, compressed as they are on the south side of the City of Chicago, Illinois. (R. 181.)

CONCLUSION.

In the light of the propositions of law heretofore advanced and the arguments made in support thereof, we respectfully submit that the judgment of the Supreme Court of Illinois, affirming the judgment of the Circuit Court of Cook County, be reversed, set aside and declared for naught.

Respectfully submitted,

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